1960

Keith D. Bullock v. Deseret Dodge Truck Center, Inc. : Brief of Respondent

Utah Supreme Court

Ray, Quinney & Nebeker; Albert R. Bowen; Attorneys for Defendant and Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

KEITH D. BULLOCK,
Plaintiff and Appellant,

—vs—

DESERET DODGE TRUCK CENTER, INC., a corporation,
Defendant and Respondent.

Case No.
9193

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

In this brief, the appellant will be referred to as Bullock and the respondent will be referred to as Deseret.

For the purposes of this appeal, Deseret will accept the statement of facts recited in Bullock's brief except as modified herein for the purpose of needed correction and clarification and as amplified to include certain matters omitted by Bullock.

At the time Bullock consummated his arrangements with Deseret to become connected with Deseret's business he had been transferred to Atlanta, Georgia, by Chrysler and was under the necessity of moving his family from Dallas to Atlanta if he remained with Chrysler (Dep. 11, 12 & 13.)

Furthermore, prior to leaving Chrysler, Bullock had been transferred numerous times and was very anxious to settle down in one place. (Dep. 11 & 12.)

The record shows, by Bullock's admissions, that he had inside information on Chrysler's plans to establish Truck Centers. He communicated this information to the Hinckleys with the principal purpose and motive in mind of himself becoming a part of one of Chrysler's Truck Center operations. The Hinckleys knew nothing about Chrysler's plans until they had been divulged by Bullock and it was Bullock, not Deseret or the Hinckleys who made the initial contacts out of which the relationship between the parties subsequently developed. Bullock was aggressively pushing the proposal in order to establish himself in the truck center business in Salt Lake City, with himself as a key and central figure in the operation. Bullock was not enticed or lured by the Hinckleys from a good and satisfactory job with any rose-tinted or extravagant promises as to his future if he would leave Chrysler and join with the Hinckleys in the Deseret operation. Bullock was fully sold on the desirability of getting into a truck center operation and did his utmost to sell the Hinckleys on his ideas. (Dep. 13-14; R. 39-42.)

The record fully and amply confirms that Bullock left his employment with Chrysler willingly and without persuasion on the part of the Hinckleys. Deseret excepts to the

impression sought to be created by Bullock that the Hinckleys gave assurances that the oral understandings of the parties regarding employment for an eight-year term would be embodied in a written document. The record shows that a contract was executed by the parties and that this agreement was the result of the mutual understanding of all parties concerned. Bullock fully understood what the agreement contained when he signed it.

> Q. "When you signed the agreement you knew and understood what its contents were?"
>
> A. "I felt I did." (Dep. 6).

Bullock himself assisted and took an active part in the drafting of the agreement, as demonstrated by the following:

> Q. "Now, with regard to exhibit 'A', the agreement was drafted two or three times before it was finally signed by the parties, wasn't it?"
>
> A. "At least once, as I recall."
>
> Q. "At least once, and I suppose you read it before you signed it?"
>
> A. "Yes, sir."
>
> Q. "And it embodies the terms of the agreement of employment that you now rely upon?"
>
> A. "Yes." (Dep. 6).

On page 2 of his brief, Bullock admits that he was dissatisfied with the original draft of this agreement, specifically the portions referring to stock options and demanded that it be redrafted. (R. 39—40).

The record is clear that the provisions of this agreement, such as they were, relating to employment, were accepted by Bullock and that he signed this agreement

without objections. These provisions of the contract make no reference to any specified term of employment. (Exh. "A" Para. 7). Bullock relies upon no other document in writing to support his contentions that he had such an agreement with Deseret. (Dep. 3—6; 23). Paragraph 3 of the agreement provided a method by which Bullock could become a participating owner in Deseret by the investment of his own capital in the stock of the corporation while employed. There is no claim that Bullock ever invested any money in Deseret stock.

Deseret takes exception to Bullock's statement that he established a going and successful wholesale truck business for Deseret as a consequence of his managerial skill and ability. It is submitted the record falls far short of establishing Bullock's successful management of Deseret. On the contrary, the record shows affirmatively by evasive, but none the less clear admissions of Bullock, that his efforts in this regard were not successful. (Dep. 15).

Finally, it is conceded by Bullock that when Deseret would no longer permit him to continue as manager, he was offered another job in the Hinckley organization, selling trucks and unconnected with managerial duties and responsibilities and with no cut in salary. Bullock declined to accept this offer and took another job paying less money. (Dep. 7-8).

STATEMENT OF POINTS

POINT I

THE STATUTE OF FRAUDS (TITLE 25, CHAPTER 5, SECTION 4 (1) U. C. A. 1953) BARS BULLOCK FROM ENFORCING THE PROVISIONS OF THE CON-

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POINT I

THE STATUTE OF FRAUDS (TITLE 25, CHAPTER 5, SECTION 4 (1) U. C. A. 1953) BARS BULLOCK FROM ENFORCING THE PROVISIONS OF THE CONTRACT SUED UPON WHICH RESTS UPON PAROL EVIDENCE.

The sole and only question to be determined in this appeal is whether Bullock should be permitted to introduce parol testimony to supply important and vital provisions of an alleged employment contract not expressed in writing. If this court agrees with the lower court that under the facts

of this case such is not permissible, the lower court was correct in granting respondent's motion for a summary judgment and should be affirmed.

It has long been the established law in this jurisdiction that contracts of the character involved in this case fall within the provisions of the statute of frauds.

> "In the following cases, every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing, subscribed by the party to be charged therewith:
>
> (1) Every agreement that by its terms is not to be performed within one year from the making thereof." (25-5—4(1) U.C.A. 1953).

The very fact that Bullock is here contending that he had an employment contract for an eight-year period brings his alleged contract within the provisions of the above Utah Statute. This statute has been construed in many cases by this court. The rule has been uniformly adopted and adhered to that in order to comply with the statute the writing or memorandum thereof must contain every essential element of the contract or the same is void.

In *Birdzell vs. Utah Oil Refining Co.*, 121 Utah 412, 242 P2, 578, it was said:

> "However, even if the letter did contain an admission, acknowledgment or recognition of the alleged prior oral agreement, there is another reason why it will not suffice as a memorandum. It is fundamental that the memorandum which is relied upon to satisfy the Statute of Frauds *must contain all the essential terms and provisions of the contract* * * * As will be noted, the letter does not state what the amount of the rent shall be, but expressly leaves that question open for further negotiations. In an

> oral contract to effect a lease for a period longer than one year, the amount of the rent is clearly one of the essential terms which must appear in the memorandum * * * *." (Italics ours).

Collett vs. Goodrich, 119 Utah 662, 231 P2 730, presented facts strikingly similar to the facts in this appeal. In that case the defendant filed a counterclaim alleging breach of an Exclusive Distributorship Contract, which was to run for five years and was to extend to the entire Uintah Basin. The existence of this contract was denied and because certain of the alleged terms of the agreement were supplied by defendant's oral testimony, the question of the statute of frauds was considered as to whether or not this testimony would be admissible. Defendant relied upon the minutes of a Board of Directors Meeting, at which a motion was presented and approved to enter into a written contract to give the defendant an exclusive dealership in Uintah County. These minutes made no mention of a dealership to be co-extensive with the Uintah Basin and made no provision for a five-year term. This court held that the agreement was within the statute of frauds and void for failure to state in writing all the essential terms of the agreement. This court said:

> "The written memorandum which is relied upon to satisfy the statute of frauds must contain all the essential terms and provisions of the contract. * * * * *Hawaiian Equipment Co. vs. Eimco Corp.,* 115 Utah 590, 207, P2 794. * * * * but before the court can assess damages for violations of the alleged contract it must appear with certainty that appellant was to have an exclusive distributorship for the entire Uintah Basin * * *."

This court also said:

> "It is elementary that compliance with the statute of frauds cannot be effected by producing a writing of some contract different from the contract on which the party is basing his claim. Appellant testified at the trial of this case that the exclusive distributorship granted to him by the refining company was to run for five years; whereas the writing on which he relies does not mention any time element whatsoever * * * * it is apparent that the agreement proposed in the minutes of the board of directors is not the same agreement appellant is attempting to establish in this action. For this reason the minutes are not a memorandum of the alleged contract."

See also *Restatement of the Law, Contracts,* Section 207, which states that one of the elements of a valid contract, enforceable under the statute, shall state:

> "(c) The terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made."

That these principles are also applicable to contracts of employment is made clear by this court in *Abba vs. Smith,* 21 Utah 109, 59 P 756. That case specifically dealt with an employment contract for three years. It was held that the memorandum considered by the court satisfied the requirements of the statute and in that case this court said:

> "Under this section unless the essential terms of the contract can be determined from the contract itself, it is within the statute of frauds, and if thus defective, the defect cannot be supplied by parol proof, for by admitting parol testimony to supply the essential parts of the contract, would be to restore the mischief which the statute of frauds was framed to prevent * * *."

This opinion quotes with approval from *Pomeroy on Contracts* as follows:

> "The memorandum, whether consisting of one writing, or of several, must contain all the essential terms of the agreement so stated, that while parol evidence may, perhaps, be resorted to for the purposes of identification, and to explain the situation of the parties and of the subject matter, *it shall not be required to supply any substantive feature which has been omitted* * * *." (Italics ours.)

It is respectfully submitted that when a party expects a court of law to find that he has contractural rights entitling him to employment for eight years or any other period beyond a year and the only writing which he can produce concerning such agreement omits any reference to such vital period, such memorandum or contract is so lacking in essential and substantive terms as to be unenforceable and may not be supplemented by oral testimony.

It is not urged or contended by Bullock that he has any other writing or agreement than the stock option agreement which will supply the missing essential parts necessary to constitute the contract upon which he relies.

At the outset Bullock concedes that the writing upon which he relies does not expressly state any specified term of employment. The written agreement, so far as it contains any provisions relating to employment, is as follows:

> "7. The Company agrees to employ Keith Bullock as its general manager and to employ Raymond Hunter as its wholesale manager." (Ex. "A").

Bullock's brief is a tacit admission that the statute of frauds applies to the agreement upon which he relies and his entire argument is an attempt to escape the consequences of the statute.

POINT II

THE WRITTEN AGREEMENT RELIED UPON BY APPELLANT IS CLEAR AND UNAMBIGUOUS AND DOES NOT REQUIRE RESORT TO EXTRINSIC EVIDENCE TO ASCERTAIN ITS MEANING.

Bullock's first proposition is that the agreement was drafted by Deseret's attorneys and hence the language employed in the agreement must be construed in his favor. So far as the record is concerned there is nothing to support this claim. On the contrary, the record affirmatively shows that Bullock himself took an active and aggressive part in the draftsmanship of the agreement. This is true to the extent that he insisted upon the redrafting thereof to include provisions he was dissatisfied with. (Dep. 6; R. 39-40).

Inasmuch as Bullock has gone outside the record to state that respondent's attorneys drafted the agreement, perhaps Deseret will be justified in likewise departing from the record merely to state that Bullock attended many conferences in the office of the attorneys where the agreement was written and gave instructions to the attorney concerning what the agreement should contain. The surrounding circumstances fairly establish that in the drafting of the agreement the attorney acted almost solely in the capacity of an amanuensis for all the parties, who in conference, instructed him regarding what the agreement was to contain. Bullock's participation in its preparation was far from passive; when the final draft was complete he read and signed the agreement, understanding what it contained and accepted it in the form in which it now appears without further change or objection. Furthermore, he considered it to fully embody the understanding of the parties. (Dep. 6).

In the guise of having the contract construed so as to include provisions which it does not contain and which would require the redrafting of the agreement, Bullock relies upon the well-known rule that a document prepared by one party as an agreement between himself and another should, in case it contains uncertain or ambiguous language, be construed against the party who wrote or had it written. The fallacy in Bullock's proposition is not that the rule which he cites is incorrect; this rule is well understood by all courts, but it can have no application to this case, because the language of the agreement is neither doubtful nor ambiguous. Furthermore, even if a document is so far ambiguous as to permit application of the rule, no case goes so far as to hold that language may be imported into it which it does not contain under the claim that that which is missing constitutes ambiguity.

An agreement is not construed against the party who prepared it, ipso facto, because such party wrote it or had it written, but only if its meaning is doubtful and it is susceptible of more than one meaning. As stated by this court in *Bryant vs. Deseret News Publishing Company,* 120 Utah 241, 233 P2 355, the rule is stated thus:

> "* * * plaintiff also invokes the rule of interpretation that doubtful and ambiguous terms in a contract should be interpreted against the party who has chosen its terms * * * we agree that this rule of construction should be considered in determining what is a reasonable and fair interpretation of the intention of the parties. However, if the language is clear and is not susceptible of more than one interpretation, the ordinary plain meaning of the words must be used."

The very cases cited by counsel state this rule clearly.

Thus, in *Huber & Roland Construction Co. vs. City of South Salt Lake,* 7 Utah 2 273, 323 P2 558, this court said:

> "* * * *Doubtful or ambiguous portions* of a contract should be construed against the party who draws it. (Italics ours).

In *Continental Bank & Trust Company vs. Bybee,* 6 Utah 2 98 306 P2 773, this court announced the rule in this language:

> "* * * the intent should be ascertained first from the four corners of the instrument itself, second from other contemporaneous writings and third from the extrinsic parol evidence of the intentions * * * if the ambiguity can be reconciled from a reasonable interpretation of the instrument, extrinsic evidence should not be allowed * * *."

Again, in *Penn Star Mining Company vs. Lyman,* 64 Utah 343, 231 P 107, it was stated:

> "There is still another element to which the courts under certain circumstances, have recourse, *in case the language in a contract is ambiguous or uncertain,* which is that, where one of the parties, or one who is directly interested in the subject matter of the contract, has prepared it and has used language which is ambiguous or uncertain in its meaning, the language will be construed most strongly against the party who has used the ambiguous or uncertain language * * *." (Italics ours).

The case of *Universal Underwriters Insurance Company vs. Bush,* CCA10 272 Fed. 2, 675, was a case involving consideration of the language of an insurance contract and certain claimed ambiguities which it contained in which the insured was contending the language should be construed in his favor. In its opinion, that court quotes

from *Bergholm vs. Peoria Life Insurance Company*, 284, U. S. 489, 76 Law Ed. 416, as follows:

> "It is true that where the terms of a policy are of doubtful meaning, construction most favorable to the insured will be adopted * * *. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction by forcing from plain words unusual or unnatural meanings * * *."

It is submitted that Bullock's first proposition is without merit because Bullock has not pointed out any ambiguous or uncertain language in the agreement. Furthermore, a party who participates actively in the preparation and drafting of an agreement to which he is a party may not invoke the rule for his own benefit to relieve himself from the consequences of a contract which he would like to repudiate after it has been signed and accepted.

POINT III

THERE IS NO BASIS FOR THE APPLICATION OF THE DOCTRINE OF PROMISSORY ESTOPPEL IN THIS CASE.

Bullock places his main reliance for reversal of the lower court upon the claim of estoppel. At the outset, in connection with this contention, he also admits that the agreement is entirely lacking in giving to him by express terms a contract of employment for eight years. The ground of the alleged estoppel is that he gave up other employment in order to accept a position with Deseret and

moved his family from Dallas to Salt Lake City upon a promise that he would be employed by Deseret for at least eight years and hence it would be a fraud to permit Deseret to discharge him without liability for the alleged damages he has suffered as a consequence. The authorities and text writers cited by Bullock all say that it is not unusual for an employment contract to be silent upon the period of time for which the employment is to endure. Thus, *Corbin on Contracts*, Section 684, page 685, says:

> "* * * Neither party may have any definite period of service in mind; in which case it is natural for them to say nothing about it, and the employment is terminable at the will of either party * * *."

Corbin then goes on to say that the exception to the exception of the general rule that the statute of frauds may not be pleaded as a defense to an oral contract rests upon negligence or the intentional misleading of one of the parties by the other in which case an estoppel may be applicable.

In *Restatement of Agency* 2, Section 442, it is likewise stated that mutual promises to employ and serve unless otherwise agreed are terminable upon notice by either party and further that if no time is specified and no consideration is given for entering into the relationship other than a promise in general terms to employ or serve, may run only so long as either party wishes. If, however, the principal receives from the agent a promise other than a promise to serve, the promise to employ *may* be interpreted to extend for a period of time which is reasonable in view of the purposes of the party who gives the consideration. An example of such consideration is cited as where in the sale of a business, a promise is made to the former owner that he shall

continue to be employed in the business in which case such a promise may be interpreted to employ the former owner for a reasonable time. The authority, however, continues and says that if the contract is unilateral, so that the principal receives nothing for his promise to employ other than the employee's promise to serve, such employment may properly be terminated by either party at will.

Counsel places great reliance upon *Ravarino vs. Price,* 123 Utah 559, 260 P2 570, in which case this court carefully considered the doctrine of promissory estoppel and refused to apply it to the facts of that case. Briefly stated, the facts claimed by the plaintiff were that he purchased a piece of real estate which he otherwise would not have purchased except for the defendant's promise that defendant would sell a parcel of real estate which he owned to the plaintiff which was adjacent to the tract which the plaintiff bought. The agreement was not signed by the defendant and the statute of frauds was set up as a defense and this defense was held by this court to be applicable. In deciding that case this court referred to *Papanikolas vs. Sampson,* 73 Utah 404, 274 P 856, where this court said:

> * * * "nor as a general rule can fraud be predicated upon the failure to perform a promise or contract which is unenforceable under the Statute of Frauds, since in such case the promisor has not, in a legal sense, made a contract, and hence has the right, both in law and equity, to refuse to perform."

In that case also, this court quoted from *Price vs. Lloyd,* 31 Utah 86, 86 P 767 as follows:

> "Courts of equity, in establishing the doctrine invoked by plaintiff, have not, by any means, intended to annul the statute of frauds, but only to

> prevent its being made the means of perpetrating a fraud. In order that a plaintiff may be permitted to give evidence of a contract not in writing and which is in the very teeth of the statute and a nullity at law, it is essential that he establish (in equity), by clear and positive proof, acts and things done in pursuance and on account thereof, exclusively referrable thereto and which take it out of the operation of the statute."

Bullock cites two cases, in both of which an estoppel was applied or the rules were stated under which it might be invoked. The first of these cases is *Seymour vs. Oelrichs,* California 106 P 88. In that case plaintiff, a Police Captain in San Francisco, was persuaded to give up his position on the San Francisco Police Force to go and work for the defendants upon the promise that if he would do so, he would receive a contract of employment for ten years and upon his representation that he could not afford to quit his job unless he was granted employment for such a period of time. Another fact of great importance in that case was that the plaintiff had a lifetime position with a pension awaiting him upon retirement about which the defendants knew. Acting upon the promise that an agreement would be written employing him for ten years, the plaintiff resigned and started to work for the defendants. When he requested that the agreement be reduced to writing, he was told by Mr. Fair, who had hired him, that Mr. Fair was too busy to have the writing prepared, but would do so as soon as he returned from a trip to Europe. Resting upon the security of these assurances the plaintiff commenced his employment with the defendant. Mr. Fair was killed and the agreement was never reduced to writing and after a couple of years the plaintiff was discharged. The Califor-

nia court, in deciding this case, held that an estoppel would apply to prevent the defendants from pleading the statute of frauds as a defense if plaintiff could establish agency between Mr. Fair and defendants.

The other case cited by Bullock is *Alaska Air Lines, Inc. vs. Stephenson,* C. C. A. 9, 217 Fed. 2 295. In that case plaintiff was hired to be general manager of the defendant airline company and moved from California to Alaska. He claimed that when he was hired, he was promised that he would receive a two-year employment contract in writing, which would be presented to him within six weeks to three months after he commenced work. Plaintiff was entitled to a six months leave of absence from Western Airlines, which he took. When the six months leave of absence was about to expire, he renewed his effort to have his employment contract reduced to writing, to no avail. After his leave of absence with Western Air had expired, defendant discharged the plaintiff, who sued for loss of wages and other damages as a result of his discharge. The court in that case very reluctantly allowed plaintiff to recover.

Bearing in mind the fact that promissory estoppel may be invoked under proper circumstances, the question still remains as to whether the undisputed facts in this case measure up to the requirements of the rule and to those facts in the cases where this rule has been applied. We submit that this record falls far short of the cases cited by appellant or the text writers upon which he relies.

The chronology of evidence in this case is interesting and important. Long before December 13, 1957, negotiations had been going on between Bullock and the other incorporators of Deseret. These negotiations resulted in the execution of a con-

tract between the parties on that date, after it had been modified and changed to meet Bullock's objections thereto. This agreement was primarily a stock option agreement but did contain references to appellant's employment as General Manager. (Exhibit "A"). Bullock took the position then, as he does now, that this instrument was an employment contract as well as a stock option agreement. He accepted the agreement as embodying employment provisions without any objections after reading and fully understanding its provisions. He commenced working for Deseret on January 8, 1958. (Dep. 6; R. 39 and 40).

A copy of the Articles of Incorporation of Deseret are in this record. (R. 56-65). The time of the execution of these articles does not appear in this record. However, the files in the Secretary of State's Office show that the articles were not executed until December 26, 1957 and were filed on December 30, 1957. Under these articles Bullock was an incorporator, was one of the six directors and vice-president. Bullock assumed and discharged these offices as well as that of general manager of the corporation for approximately a full year. Bullock asserts in his brief that he would not have terminated his employment with Chrysler until given assurance that he would have an employment contract.There is nothing in the pleadings or in any of the other parts of this record which support this contention. Not even the affidavits in the record make this assertion. The complaint alleges that Bullock had an employment contract, which he attaches as Exhibit "A" to his complaint and which he says Deseret breached. There is no allegation in the complaint that he was promised a written contract which Deseret refused to honor after he was employed or that he would not have quit a job to become connected with Deseret without such a contract in writing. His

affidavits merely allege that he relied upon Exhibit "A" as an employment agreement for eight years.

In none of the cases cited and relied upon by Bullock are the facts similar to this case. In those cases there was no contract in writing at all, although the employee resigned other employment, relying upon a promise that a written contract would be forthcoming. In those cases there was a situation also where the employee had been induced or persuaded to leave his job. In this case, Bullock was the promotor and principal figure in setting up a new and untried business and thus creating for himself a new business enterprise in which he had high anticipations of success.

This court has had occasion to construe the case of *Seymour vs. Oelrichs*, supra, in *Ravarino vs. Price*, supra, and also in *Easton vs. Wycoff*, 4 Utah 2, 386, 295 P2 332. In the *Easton* case we have all the elements present on which Bullock would rely for a reversal.

In that case, which involved an oral promise to execute a written lease, the facts were that the defendant had promised to have a written lease drawn up which would satisfy the statute of frauds and upon the basis of this promise the plaintiff had moved his business from Trinidad, Colorado, to Utah and had entered into the premises where the lease was to be in effect with the knowledge of the defendant and thereafter, having moved into the premises, the defendant refused to execute a written lease, whereupon plaintiff sued for damages, claiming his inability to negotiate a favorable lease with the owner of the leased premises. The defendant pleaded the statute of frauds, and, as in this case, the plaintiff asserted that the defendant should be estopped from relying on the statute of frauds. It was held estoppel would not apply and

that the lower court had acted properly in granting the defendant's motion for summary judgment. In the course of the opinion in the *Easton* case, this court says:

> * * * "the mere refusal to execute a written contract as agreed does not constitute 'fraud' within the rule that the statute of frauds will not be enforced where the effect would be to perpetrate a fraud. * * * and to hold otherwise, would, in effect, completely nullify the statute of frauds."

In discussing the *Oelrichs* case, supra, this court pointed out that Seymour gave up a lifetime position in order to enter the defendant's service and also refers to the case of *Morris Company vs. Mason,* Okla. 39 P2 1 43 P2 401. The Morris case involved also a long term employment contract which was to be reduced to writing and this court says, in discussing that decision, that the position which the plaintiff gave up was one which was terminable by his former employer and that his moving was not occasioned by any promise of employment. These facts are strikingly similar to the case at bar. Bullock was working for Chrysler, but there was nothing which prevented Chrysler from discharging him. He had no lifetime contract and, as we have pointed out, Bullock would have been obliged to move anyway, because he had already been transferred by Chrysler to Atlanta, Georgia. This court refers also in that case to *Albany Peanut Company vs. Euclid Candy Company*, Calif. 85 P2 471, from which the following is quoted:

> "* * * The circumstances must clearly indicate that it would be a fraud for the party offering the inducements to assert the invalidity of a contract under the statute and unless the words and conduct of the party sought to be held amount to an induce-

> ment to the other to waive a written contract in reliance upon the representation that the person promising will not avail himself of the statute of frauds there is an absence of fraud which is requisite to an estoppel. * * * a mere promise to execute a written contract followed by refusal to do so, is not sufficient to create an estoppel, even though reliance is placed upon such promise and damages occasioned by such refusal. The acts and conduct of the promisor must so clearly indicate that he did not intend to avail himself of the statute that to permit him to do so would be to work a fraud upon the other party * * *."

And, futhermore, this court stated the following in the *Easton* case:

> "If an action sounding in tort were allowed in every instance where the contract was unenforceable because not in writing and barred by the statute of frauds, the statute would be rendered meaningless."

We submit that this record is entirely lacking in even a suggestion that Bullock was given to understand that Deseret would not avail itself of the defense of the statute of frauds; that the principles announced by the *Easton* case must be applied and that there is no fraud present upon which an estoppel can be based upon the bare contention made by Bullock that he was led to believe by the contract which was signed between the parties that he was being employed for at least eight years.

Finally, if Exhibit "A" is an employment contract, as Bullock asserts, there can be no promissory estoppel, because according to Bullock himself, Deseret did in fact give him a written contract of employment terminable at will. We submit that it is wholly inconsistent for Bullock to contend in one breath that the agreement he relies upon is an employ-

ment contract legally sufficient to form the basis of his claim and to fully meet the requirements of the statute of frauds and in the next breath to assert that he was entitled to such a contract in writing and that Deseret's failure to perform this promise forms the basis of an estoppel to prevent the pleading of the statute of frauds.

If the agreement which Bullock accepted after reading, and fully understanding it, did not contain the entire agreement of the parties, Bullock had ample opportunity to object before it was signed and thus to have it corrected and to embody what he now asserts was the true agreement of the parties. He knew what was in this contract when it was signed and its language could not possibly have misled him to assume that he was employed for eight years.

We submit that the record supports Deseret's contention that Exhibit "A" reflected the entire and complete agreement of the parties and that there is no basis in this case for the principle of estoppel to be applied.

Additionally, we desire to point out that if Bullock wished to rely upon estoppel in this case, it was his obligation and duty to plead the facts upon which the estoppel would be based. In *Collett vs. Goodrich*, supra, this court held in the following language that a party relying upon promissory estoppel must plead it:

> "* * * Where estoppel is not pleaded, it is inadmissible * * * * The object of the declaration is to give the defendant fair notice of the case he is called into court to meet * * * under the circumstances of the instant case, the appellant need not anticipate what defenses were intended to be relied upon, within the plea of general denial in order to affirmatively plead that respondent is estopped from relying upon

> the statute of frauds * * * the statute of frauds is a defense which may be waived if the party desires to stand on the oral contract. It should be expressly and clearly invoked before a pleading of estoppel be required, in order to dispense with the necessity of producing a written contract or a written memorandum thereof. But there was ample opportunity at the trial to amend and plead estoppel, after counsel for appellant were specifically apprised of respondent's reliance on the defense of the statute of frauds. No amendment was asked, nor did appellant's motion for a new trial mention estoppel. So far as the record shows, it appears initially in appellant's brief.
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> Although estoppel may be considered for the first time on appeal in some equity cases, *Mason v. Ellison*, 63 Ariz. 196, 160 P2d 326, the majority view is that the question will not be considered by the appellate court without first having been properly presented to the trial court. Appellant should have requested permission to amend and plead estoppel or it should appear in the pre-trial order. Having failed to do so it is not properly presented for determination."

In this case, after the filing of Deseret's amendment pleading the statute of frauds, Bullock made no attempt to amend to plead estoppel. This question is presented for the first time in Bullock's brief and is too late. The record shows Deseret's pleading of the statute of frauds was served on Bullock on October 1, 1959. No reply to this amendment was ever filed. The motion for summary judgment was argued October 13, 1959. Both parties filed written memoranda with the lower court. At no place until the filing of his brief did Bullock give notice that he was intending to rely on estoppel to escape the operation of the statute of frauds. That he had ample opportunity prior to the filing of his brief to do so is clear.

POINT IV

THE AGREEMENT RELIED UPON BY APPELLANT IS NOT SUFFICIENT TO SATISFY THE REQUIREMENTS OF THE STATUTE OF FRAUDS.

What we have already said regarding the question of estoppel and the legal insufficiency of the agreement to satisfy the statute of frauds on the question of Bullock's employment for eight years largely disposes of appellant's next contention that this agreement was in law sufficient and hence is not subject to the statute of frauds.

Under Bullock's third point, he again concedes that the agreement made no provision for a definite employment term. On the basis of this admission, we can only reiterate that which we have already said, viz., that where an employee relies upon a definite agreement to employ for a term of years, this provision being one of the essential terms of such a contract, must be in writing, notwithstanding Bullock's contentions to the contary. Bullock, in order to escape the common requirements of the statute, attempts to use the stock option provisions of the agreement to supply the necessary writing to support an agreement to employ him for at least eight years. He dismisses as insignificant the language of Article 3 of this contract which expressly says that the option to purchase stock must be exercised during his employment. We submit that this is an untenable position in the face of the rule which declares that the language of a written agreement must all be considered in seeking to determine the intention of the parties.

One of the prime purposes of stock option agreements in favor of employees is to offer them an incentive to remain

with the organization which grants it. It was therefore most natural for this agreement to provide that the stock options should only be exercised during Bullock's employment. It could hardly be expected that such an option would run in perpetuity and hence a time limit was provided during which Bullock, though employed, was required to make up his mind if he wanted to buy the stock covered by the option. It was made plain by language of the agreement that these options must be exercised not later than eight years after the date of the agreement. There is nothing in the agreement to support Bullock's contention that Deseret solely and acting alone chose eight years as the outside limit of exercising the options —this was a provision mutually agreed upon. It is a non sequitur for Bullock to argue that because his agreement gave him eight years to purchase stock, if his employment continued that long, that this privilege constituted any assurance or promise that he was to be employed for that period of time. Bullock likewise argues that the second option, which provided for the purchase of stock in the event the Hinckleys desired to sell, gave to Bullock the right to purchase from Hinckleys regardless of whether he was employed at the time the stock was offered for sale. We submit that such construction is unreasonable and in contradiction of Article 3 of the contract, which limited his right to purchase stock to the time when he was still employed. The plain meaning of the contract is that Bullock's right to purchase stock was to be exercised *during employment* and not afterwards.

Bullock relies upon the case of *Magness vs. Madden*, Ark. 207 SW2, 714, for the proposition that where an employee is given a right to buy an interest in a business which he may exercise for a definite period of time, such fact is evidence of

an intention that the employee is to be employed for a period coextensive with his right to acquire such an interest. That case is not authority for the case presented by this record. First, because, as counsel points out, the business involved was a partnership and did not involve a stock option and secondly, because in that case there is no limitation upon the employee's right to buy an interest in the business for five years. In this case, on the other hand, the agreement gives no such unqualified right, but expressly limits the right to the period of actual employment. Furthermore, we submit that the *Madden* case is directly contrary to the Utah decisions which hold that every essential element of a contract not to be performed in one year must be in writing. Furthermore, there is no merit to the contention made that Bullock paid consideration for his employment in addition to his promise to serve. The record shows absolutely no other promise made by Bullock than that he would work for Deseret.

As we pointed out in *Restatement of Agency*, Section 442 (c), supra, an employment contract is unilateral if no consideration is given by the employee. Bullock made no promise to work for eight or any other number of years. He was free to quit or resign at any time, nor was he obligated to buy any stock. The only thing in the way of additional consideration to which Bullock can point is that he gave up another job and moved his family. We have already pointed out the reasons why this cannot be considered a consideration to support a promise of a definite term of employment. Aside from the fact that Bullock quit a job and moved to Salt Lake this case is no different than any other case in which an employee, in order to accept a new job, must necessarily resign from his old position.

There is no element of inequity or unfairness established

by a showing that an employee has quit a job or moved his family, standing alone, to justify setting aside the statute of frauds. The authorities cited by Bullock hold that much more must be involved. We return once more to the unquestioned facts of this case that there was no inducement by Deseret which prompted Bullock to quit Chrysler. This he proposed doing himself. All of the facts established that he was eager to do so and nothing appears in the record to support his contention that he would not have quit Chrysler without an eight-year contract. We submit further that Bullock's position is unreasonable when it is considered that Deseret had not even been incorporated when the agreement was signed; that it was a new and untried business; that no one could possibly foretell or guarantee that it would be successful. Under these circumstances to say that Bullock was to be guaranteed eight years of employment, regardless of what happened and without any corresponding obligation on him to continue the employment is putting a strain upon credulity.

Bullock states that the reason he was offered another job with Hinckleys was because Deseret did not dare to discharge him because it well knew and understood that the contract is much different than Deseret now argues it to be. This is a gratuitous statement wholly unsupported by any evidence in the record.

The last proposition argued by Bullock under point four is that the offer of another job by Hinckleys at a salary as good as the one paid by Deseret would not cast upon him the duty of acceptance in mitigation of his damage. There is no attempt, however, to deny that Bullock was actully offered such employment at as good a salary as the one previously en-

joyed, and there is nothing in the record to support the proposition that the offer was conditioned upon Bullock surrendering or giving up any contractual rights. He chose not to accept this offer and the record is therefore conclusive that he did not desire to mitigate his loss and voluntarily accepted other employment for less compensation.

CONCLUSION

The judgment of the lower court should be affirmed, because an essential part of the alleged agreement upon which appellant relies was not in writing and hence appellant is barred from recovery by the statute of frauds. There is no basis in the facts and circumstances for an estoppel nor was estoppel ever pleaded. The agreement between the parties is not ambiguous in its terms so as to permit the admission of parol evidence to explain any doubtful or ambiguous provision. The agreement was signed and accepted by both parties and especially by Bullock after his active participation in its drafting and preparation.

Respectfully submitted,
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and ALBERT R. BOWEN